United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2092.

No. 3, SPECIAL CALENDAR.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CAPITAL TRACTION COMPANY, A BODY CORPORATE.

No. 2093.

No. 4, SPECIAL CALENDAR.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON RAILWAY & ELECTRIC COMPANY, A BODY CORPORATE.

No. 2091.

No. 2, SPECIAL CALENDAR.

CAPITAL TRACTION COMPANY, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA.

BRIEF OF THE UNITED STATES.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

F. SPRIGG PERRY,
Assistant United States Attorney.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

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Statement of the Case.

Section 16 of the act of Congress approved May 23, 1908, provides:

> "SEC. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, and to make, alter, amend and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regulations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense."
>
> 35 Statutes at Large, 246.

On the 30th day of June, 1909, there was filed in the Police Court of the District of Columbia, on behalf of the

Interstate Commerce Commission, certain informations against the street railroad companies of the District of Columbia, in which it was alleged that these corporations controlled and operated street railroads, and that, on certain days therein named, these railroad companies had operated their cars in violation of the act of May 23, 1908.

In the first two cases above named in the title to this brief (that is, the cases in which the United States appears as plaintiff in error) the information charged that they, the railroad companies, had operated cars over the said street railroads in the District of Columbia, the first count of said information charging as follows: "did operate and run certain cars over and upon said railroad on certain streets in said District, and in so operating said cars did unlawfully permit a certain car so being operated by it over said railroad to be crowded by persons desirous of the use of the same, and did thereby unlawfully fail to operate the said cars on said railroad so as to give passage to all persons desirous of the use of said cars without crowding the same;" and the second count of said information charging as follows: "did then and there operate and run said cars over and upon said railroad on said streets in said District, and in so operating said cars did unlawfully fail to operate the said cars on said railroad in such manner as to give passage to all persons desirous of using said cars, without crowding the same, and did unlawfully permit the said cars so being operated by it over the said railroad to be crowded by persons desirous of using the same."

Whereupon, on the said 30th day of June, A. D. 1909, the attorneys representing these companies came into court and filed their motion to quash the informations filed by the United States Attorney, and, in their motion to quash, alleged that the Police Court was without jurisdiction of the matters alleged in the information, because section 16 of the said act is unconstitutional and void, and further, that no proceeding can be had under said section, but only under some rule or regulation passed in pursuance of said section.

On November 9, A. D. 1909, the motions to quash these two informations were granted, and the informations were accordingly quashed. Exceptions were taken to the ruling of the court, and the Attorney for the United States, acting for the Interstate Commerce Commission, applied in due time for a writ of error to this court, which was allowed.

The third case set out in the title above, namely, that of the Capital Traction Company, plaintiff in error, against the United States, was based upon certain rules and regulations adopted by the Interstate Commerce Commission in accordance with the Act of Congress approved May 23, 1908. The information in this case was filed on June 9, 1909, in the Police Court, and charged that the Capital Traction Company had violated certain provisions of the rules and regulations passed by the Interstate Commerce Commission, in that they had operated a car over the street railroads of the District of Columbia, which car was equipped with wheels causing unnecessary noise and unevenness in operation, commonly known as flat wheels. On June 30, 1909, the Capital Traction Company, through its attorneys, filed a motion to quash the information, on the ground that the Act of Congress of May 23, 1908, was unconstitutional in that it provided for excessive penalties. As the question involved in this case was the same as one of the questions involved in the other cases, the three cases were argued and submitted together. On the 9th day of November, A. D. 1909, the judge of the Police Court overruled the motion to quash of the Capital Traction Company, and thereupon counsel for the company applied for, and obtained, a writ of error from this Court, notwithstanding the fact that this case has never been finally disposed of in the Police Court.

Assignment of Errors.

1. The Police Court of the District of Columbia in the cases of United States against the Capital Traction Company, No. 2092, and of the United States against the Washington

Railway and Electric Company, No. 2093, erred in granting the motions to quash, and in dismissing the informations.

2. The Court erred in holding that the provisions of Section sixteen of the Act of Congress of May 23, 1908, were indefinite in themselves and needed to be amplified by specific rules, orders and regulations of the Interstate Commerce Commission promulgated under the authority of said section before they could properly be enforced.

ARGUMENT.

Section sixteen of the Act of Congress, approved May 23, 1908, provides for at least five separate and distinct offenses for which the railroad company might be fined. These offenses, in brief, appear to be—

1. The railroad company shall supply and operate a sufficient number of cars.

2. The cars shall be sanitary.

3. The cars shall be in good repair, with proper and safe power and equipment and appliances and service, comfortable and convenient.

4. The railroad company shall give expeditious passage not to exceed 15 miles an hour within the city limits or 20 miles an hour in the suburbs.

5. The said cars shall be operated in such manner as to give passage to all persons desirous of using said cars, without crowding the same.

This section of the Act further provides that the Interstate Commerce Commission is hereby given power to require and

compel obedience to all the provisions of this section, and, in addition, provides that the Interstate Commerce Commission shall have authority to make, alter, amend, and enforce all needful rules and regulations to secure said obedience and to make all such orders and regulations which are necessary to the exercise of the powers herein granted to it, as may be reasonable and proper.

In the penal clause of this section it is provided that a violation of the provisions of this section or any of the said orders or regulations made by the Commission shall be punished by a fine not to exceed one thousand dollars.

There are two provisions of this law the violation of which can be punished by the penalty named. In the first place, we have the penalty for the violation of any provision of the Act, irrespective of any orders or regulations made by the Interstate Commerce Commission. This is a violation of the section itself, and can be punished separately and apart from any rules and regulations of the Commission. In the second place, we have the second aspect of the law, which gives authority to the Interstate Commerce Commission to make orders and regulations, and provides for a penalty in the case of the violation of such orders and regulations. Of course, before any violation of such orders or regulations can be prosecuted by an information, there must have been lawful orders and regulations of the Commission duly promulgated. Where the language of the act is specific and plain in providing that the street railroad companies shall do or refrain from doing a specific act, the Interstate Commerce Commission does not need to pass any orders or regulations, but the prosecution is based on the Act itself, and no order or regulation of the Commission is required.

Counsel for the railroad companies in the Police Court strongly urged that the provisions of this section were simply and solely a delegation of general power to the Interstate Commerce Commission to supervise the street railroads in the District of Columbia. They contended that the pro-

visions of this section itself could not be used as the basis for an information in the Police Court, when the Interstate Commerce Commission had not passed specific orders and regulations. In other words, the information in the Police Court, according to the contention, must be predicated, not upon the law, but upon certain rules and regulations of the Interstate Commerce Commission. To carry their contention to its farthest limit, they contended that an information under the Act would not lie against a street railway company for running a car in the city limits in excess of 15 miles an hour, but that the Interstate Commerce Commission would have to pass an order in confirmation of the limit provided by the Act of Congress, and that the information for excessive speed must be predicated upon the violation of such order.

There are two clauses in this section of the Act which bring out very clearly the contention of the Government. In the first place, *"the Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section."* This is specific, plain, and absolute, and directs the Interstate Commerce Commission to see that the requirements provided for in this Act are carried out by the street railway companies. The Commission is given power to make all needful rules and regulations to secure obedience to the provisions of this section. In addition to this requirement of obedience to the provisions of the section itself, *"said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper."* This is a separate provision from that portion of the Act which refers to the Interstate Commerce Commission requiring obedience to the provisions of this section of the law. In the one place we have the Interstate Commerce Commission requiring obedience to the provisions of the section, and in the second place we have the Interstate Commerce Commission passing

certain orders and regulations which they are given authority to promulgate.

Further considering this same section, we turn to the penalty clause of the law. Does Congress, in providing a penalty for the violation of this Act, carry out the interpretation of the law which we here contend for? Most emphatically Congress has emphasized this aspect of the law in the penalty clause. In the first place, a fine is provided in case of *"any such company or corporation, or its officers or employees, violating any provision of this section."* Congress does not, however, stop with providing a penalty for disobedience to the provisions of this section alone; and the law continues and provides for a penalty in the case of the violation of *"any of the said orders or regulations made by said Commission."* This, too, is a single provision for which a penalty is provided. Attention of the court is particularly directed to the use of the disjunctive "or" between the two clauses of this section which provides for the enforcement of penalties. Congress does not provide for a fine for the violation of the provisions of the section *and* for a violation of the orders and regulations made by the Commission. Congress, in carrying out the dual aspect of this law, has specifically indicated and has placed on the statute books this disjunctive particle.

All parts of a statute must be construed together, and, where it was contended that the statute of limitations against bringing in an indictment or information after two years did not apply to actions of debt for a pecuniary forfeiture, Chief Justice Marshall said:

> "It is true that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislature those general expressions are used in a particular sense, and the argument is a strong one which contends that the latter words describing the remedy imply a restriction on those which precede them. Most frequently they would do so. But in the statute under consideration

a distinct member of the sentence describing one entire class of offenses would be rendered almost totally useless by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation would be to attribute a capriciousness on this subject to the legislature which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable would be to *overrule express words and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it.* In this particular case the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained."

Adams v. Woods, 2 Cr. (U. S.), 341.

"It is a well settled rule of interpretation that where a statute makes a special provision, and also a general provision, which is broad enough to include the former, the general provision is neither a repeal of the special provision nor an addition to it. They must both stand separate and distinct from each other, the former applicable to the special case and the latter to all others, unless, by taking the whole act together, a different interpretation is clearly indicated as the will of the legislators."

Sams v. U. S., 27 St. Cls., 273.
Approved in *McKee v. U. S.,* 164 U. S., 287.

Congress, in passing this Act, had provided a punishment not only for a violation of an order or regulation passed by the Commission by virtue of the power given under the Act, but has also provided for a punishment of a violation of any provision of the Act itself. We contend that where there is a specific offense created by this Act, any violation of its

provisions can be punished without any additional order or regulation issued, or to be issued, by the Interstate Commerce Commission.

Crowding.

The Interstate Commerce Commission has passed no orders or regulations relative to the number of persons who should be permitted to ride on any of the street cars in the District of Columbia. The provisions of the section provide that the cars shall be operated in such manner as to give passage to all persons desirous of the use of said cars *without crowding said cars.*

Congress had provided specifically that the street cars in the District shall not be *crowded.* And this provision is a specific and absolute command in the section itself, any violation of which would be prosecuted without reference to any order or regulation of the Commission. The law itself is plain, simple, and absolute, and must be obeyed. What constitutes crowding is a question of law; whether or not a car is crowded is a question of fact. Whether or not the testimony shows a crowded condition is a question for the jury under proper instructions from the court.

"The word "Crowd" has been defined by the Standard Dictionary to mean: "To fill with or as a crowd to overflowing; pack, as *A multitude crowded the church.* To squeeze closely together; cram; as, *They crowded us into a small room.* To throng together; get closely together in numbers; assemble in multitudes."

That the words "crowd," "crowding," and "crowded" have been used in the ordinary sense by courts is well sustained by authority. Thus, in the case of North Baltimore Passenger Railroad Company *vs.* Kaskell, 78 Maryland, 519, the court said:

> "It appears from the testimony offered on the part of the plaintiff that the car was densely crowded; passengers were standing in the aisle, and filling the rear

platform. The car was jarring heavily and passengers with difficulty retained their seats in the car."

In Camden and Atlantic Railroad Co. *vs.* Hoosey, 99 Pennsylvania State, 497, the court says:

> "The overcrowded condition of all the cars composing the train and the consequent inability of the plaintiff and others to procure seats were facts clearly proven."

In Germantown Passenger Railroad Company *vs.* Walling (97 Pennsylvania State, 55), 10 American Negligence Cases, page 112, the court, in stating the case, said:

> "The car stopped, but owing to its crowded condition he was unable to get on the rear platform."

And the court, further on, on page 117, says:

> "He voluntarily got upon a car so *crowded* that he was obliged to take a position on the steps of the front platform of the car."

In Worthington *vs.* Central Vermont Railroad Company (64 Vermont, 107), 10 American Negligence Cases, page 331, on page 343, the court says:

> "His claim was as shown by the charge in his testimony that the passage where he stood after giving up his seat was crowded."

In McGerty *vs.* Manhattan Railroad Company, 1 American Negligence Reports, page 649, the court said:

> "But upon this point the evidence warranted the jury in finding that the cause of the plaintiff's falling from the platform was on account of the overcrowding of the platform with passengers waiting to take the train for transportation."

Further on, on page 650, the court said:

> "It is easy to see that * * * unless they were moved by the train the platform of the station would

become overcrowded and that such overcrowding might render the place unsafe. That was shown to be the condition in this case."

No rule or order of the Interstate Commerce Commission would be permitted to contradict or vary the meaning of the term "crowding." Congress has used it in the act, and it is to be taken in the sense in which Congress used it—that is, used in the sense in which it is commonly accepted. Congress has used this word—a word of plain, ordinary, common, every-day use—and the Interstate Commerce Commission cannot alter its plain and unmistakable language. We insist that this is one of the specific offenses provided by Congress for violation of which a prosecution may be instituted, and it needs no orders or regulations of the Interstate Commerce Commission to render it any more definite or clear than it stands.

While the word "crowding" does not appear in any legal dictionary, it is nevertheless used in this section in its plain and ordinary sense. It is not a word which it is difficult to construe. It is a word the meaning of which we all recognize, and it is not necessary that the word should first be defined by some legal authority before it can be made the subject of a penal offense. If this were so, there would be no such thing as a court for the first time defining the meaning of a word in a penal statute. One of the principal rules of construction of statutes is that the words are to be given their plain, ordinary meaning, and that the courts are so to construe them in the absence of any technical definition. The courts in construing these statutes find their precedents in the language of the people, and do not have to look for a precedent in the language of the court.

"The popular and received import of words furnished the general rule for the interpretations of public laws."

Malliard *vs.* Lawrence, 16 How., 251.

"The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context."
Levy *vs.* McCartee, 6 Pet., 110.

An examination of the Code will show numerous instances where words are used to constitute an offense, which words are not defined by any legal authority, and also cases where the court has to inform the jury as to the meaning of the words, and they have to find whether the facts stated come within that meaning. For instance, section 803 makes it a crime where a person "threatens another in a menacing manner." These words have a known meaning in our language, but it is doubtful if you find one out of the three in a legal dictionary. Section 810 uses the words "by sudden or stealthy seizure or snatching," and as to these words we might say exactly the same thing. Section 812 uses the words "carries off or decoys out of the District any person." Section 814 uses the words "cruelly beat, abuse, or otherwise willfully maltreat any child." Section 819, in defining blackmail, uses the words "threatens to expose or publish any of his infirmities or failings." Section 825, referring to depredation on fixtures in houses, uses the words "cut, break or tear from its place." Section 826*a* uses the words "connect or disconnect." Section 828, referring to property, uses the word "destroy." Section 837 uses the words "entrusted with anything of value." Section 844, referring to destroying or defacing public records, uses the words "defaces, mutilates, destroys, abstracts, or conceals." Section 846 uses the words "places an obstruction on or near the track." Section 847 says, "whoever maliciously cuts down or destroys by girdling or otherwise any standing or growing vine, bush, shrub, sapling or tree on the land of another."

Excessive Fines.

The section of the Act upon which this prosecution is based provides that for the violation of the Act a fine of not more than one thousand dollars may be imposed by the court. In no part of the Act is there named a minimum penalty. Under the provisions of the Act any person or corporation violating these provisions may be fined any amount from one cent to one thousand dollars. The motions to quash, filed on behalf of the defendants below, raised the question of the constitutionality of the Act. The contention was there made that the fine provided in the Act was exorbitant and excessive and such as shocked the conscience of mankind and therefore in violation of the Constitution. We meet this objection in a twofold manner.

In the first place, the constitutionality of a penal act of Congress depends, not upon the *maximum* fine imposed by the law, but rests upon the *minimum* fine which the law permits to be imposed.

In the second place, we contend that the provisions of this particular section of the Act of May 23, 1908, are not exorbitant, nor excessive, nor confiscatory in amount, but are reasonable and proper.

The general principle of law fixing the *minimum* punishment as the basis for testing the constitutionality of the Act is very clearly enunciated in volume 13, American and English Encyclopædia of Law, second edition, page 60:

> "Fines are to be fixed with reference to the object which they are desired to accomplish, and their imposition and regulation belong to the legislature, to whose discretion and judgment the widest latitude must be conceded. The courts cannot with reason or propriety question the action of the legislature, or control or restrain its discretion, in the matter of fixing the amount of a fine, except where *the minimum* penalty is so plainly disproportioned to the offense or act for which it is imposed as to shock the sense of mankind."

A large number of authorities are quoted in support of this principle, and we have found no single authority which in any way supports the contention that the maximum fine is the basis upon which to test the constitutionality of this law.

The first authority to which attention is directed under this head is the case of Southern Express Company vs. Walker, 92 Virginia, 59. The Code of Virginia provided that where an express company made a charge *in excess of the rate fixed by law,* there should be a certain forfeiture by the company, and one-half of this fine should be for the use of the informer. An action in trespass on the case was brought by one Walker against the Southern Express Company, for an overcharge for a package weighing not more than one-half ounce; the distance to be carried was twenty miles, and the price charged was one dollar. The plaintiff laid his damages at five hundred dollars, and the jury allowed him two hundred dollars. One of the questions raised on this case was whether or not the minimum fine of one hundred dollars provided by this section of the Code of Virginia was excessive, and in violation of the Constitution of Virginia, which provided that "excessive fines" ought not to be imposed. The court did not consider that the provision of the law fixing the minimum fine of one hundred dollars was excessive, or that the fine of two hundred dollars recovered by the informer in this case was such as to shock the sense of mankind. The court held:

> "The imposition and regulation of fines belongs to the legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be imposed with reference to the object which they are designed to accomplish. The degree of criminality of the offense, or the illegality or impolicy of the act they are intended to punish or prevent, are elements that must enter into their consideration. The peace of society and the welfare of the people occasionally require that the legislature shall create new offenses, and affix penalties for their violation,

> or alter the penalties for others already existing. What is to be the legislative guide in the performance of this duty, but its sound judgment and the wisdom of experience? And how can the courts with reason or propriety question the action of the legislature, or control or restrain its discretion, except where the *minimum* penalty is so plainly disproportioned to the offense or act, for the violation of which it is fixed, as to shock the sense of mankind? * * * A fine that would prove efficacious in the case of an individual, and beyond which it would appear to be excessive to go, would be likely to prove ineffectual in the case of a corporation, with its aggregate wealth and power, and its disposition to act, ofttimes, in an arbitrary manner, because of the inability of private persons to contend against its illegal and wilful acts. The *minimum* fine prescribed by Section 1220 cannot be declared to be excessive by any standard which the courts can apply, and this objection should not be further considered."

The same principles, so clearly enunciated by the Virginia Court, are applicable to the present case. The Courts of the District of Columbia cannot control the sound discretion of Congress in fixing a fine of one thousand dollars for an offense created by this Act of May 23, 1908. Do not the peace and welfare of the people of the District of Columbia "occasionally require" that Congress shall create new offenses and fix penalties for their violation? Why should the people of Virginia be entitled to any greater protection than the people of the District of Columbia? Again, the reasoning of the Virginia Court with reference to the corporate interests involved there is applicable to the present case. A fine that might prove efficacious in the case of an individual transgressing the laws of the District of Columbia would be likely to prove ineffectual in the case of large corporations, such as handle our street transportation business in the District of Columbia. The Courts of this District will not take from Congress the authority to impose upon these corporations a fine in suffi-

cient amount to compel them to provide for the welfare and protection of the people of the District.

The Court in this Virginia case refers to the possibility that an excessive fine may be imposed under the provisions of this Act. The Court, on page 67, says:

> "How can the bare possibility that an excessive fine might be imposed by a jury invalidate the statute? If so, a statute otherwise valid might be annulled by a possibility that might never happen. If a jury were to render a verdict so excessive as to contravene the inhibition of the Constitution, the wrong or vice would lie in the verdict, and not in the statute. * * * The question as to an excessive fine is a judicial one, and does not affect the validity of the statute."

The case of *Frese vs. State,* 23 Florida, 268, is very much in point, not only from the reasoning of the Court, but from the fact that it was a criminal prosecution. In that case the defendant Frese was convicted of selling liquor without a license, and a writ of error was allowed and the case considered by the Supreme Court of Florida. One of the contentions raised by the defendant Frese was the unconstitutionality of the Act providing for this prosecution, on the ground that the Act did not provide a *maximum* amount of the fine which might be imposed by the Court. This, it was contended, rendered the Act void within the meaning of the Florida Constitution prohibiting the imposition of excessive fines. But the Supreme Court of Florida did not agree with this contention, and, in affirming the conviction of the defendant Frese in the lower court, held:

> "The same provision against excessive fines is to be found in the English Bill of Rights, and we learn from Blackstone and the other authorities that it was not necessary for the statute fixing the punishment of an offense by fine and imprisonment to do more than declare the general nature of the punishment fixed: by fine or imprisonment. The duration and quantity of each must, says Blackstone, frequently vary from

the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances, and 'the *quantum* in particular of pecuniary fine neither can nor ought to be ascertained by an invariable law,' and he says the statute law has not often, and the common law never, ascertained the quantity of fines. The Bill of Rights (which, according to Blackstone, was only declaratory of the old constitutional law of England), restrained or regulated, by the provision referred to, the discretion of the judges in adjudging the quantity of the punishment. * * *

"It is perfectly clear that the statute in question does not of itself violate our Bill of Rights by imposing an excessive fine for the commission of the offense of selling liquor without a license, unless it be that the *minimum* fine authorized by it be itself an excessive one for the offense denounced. The amount of three hundred dollars is the sum required for a State license, and counties and incorporated cities and towns each may impose further license taxes not to exceed fifty per cent. of the State tax. * * * This being so, and the Act not prescribing a *maximum* fine it cannot be said that it imposes an excessive one. The mere failure to fix the *maximum* of a fine is not the imposition of an excessive fine. In the absence of the statutory declaration of the *maximum* the courts are regulated or restrained by the same provision of the Bill of Rights that the citizen relies upon for protection against the infliction by them of excessive fines within the *maximum* where such a *maximum* has been prescribed by statute. It cannot be denied that the fine imposed by the court upon a person may, upon the facts and circumstances of a particular case, be excessive though within the maximum; though such a statute may be clearly free from the charge of unconstitutionality, yet it may be that the judge in fixing or in approving or sustaining a fine fixed by the jury would err in the *quantum* of the fine inflicted; he may have gone too far above the *minimum*, where both the *minimum* and the *maximum* were specified, or too close to the *maximum*, where only the *maximum* was specified by the statute."

The court very plainly recognizes the fact in this case that it is the minimum fine which is the test of the constitutionality of a particular statute, and that where such minimum fine does not violate the provision relative to excessive fines then there can be no question of the constitutionality of the Act. It is true, as the court says in this case, that in a particular case a fine lying above the minimum and within the maximum may be excessive, but this will not in any way touch the validity or the constitutionality of the Act; but the sentence in the particular case is void only.

A case in Iowa illustrates in a very marked degree the extent to which the court will go in permitting the legislature to exercise its discretion in the matter of fixing punishments for particular offenses. In the case of State *vs.* Teeters, 97 Iowa, 458, there was an indictment for obstructing a public highway, a verdict of guilty, judgment and appeal. The contention in the case was that the statute was unconstitutional and in violation of the section of the State Constitution which provided that excessive fines should not be imposed, and cruel and unusual punishments should not be inflicted. But the court says:

> "The indictment is laid under Code section 3979 which provides penalties for various offenses in maliciously injuring, removing or obstructing any bridge or plank road, or cutting, burning or destroying any telegraph posts or the wires or apparatus thereto belonging, as well as the offense in question, and the penalty is imprisonment in the penitentiary not more than five years or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. It is urged to us that the statute is unconstitutional because it violates section 17 of article 1 of the Constitution of the State, which provides that 'excessive fines shall not be imposed and cruel and unusual punishments inflicted.' While under the act an excessive fine might be imposed for a technical, practically harmless violation of the law, it could not be said that the law imposed it, if it comes near permitting the least possible pun-

> ishment. If the law affixed arbitrarily an excessive punishment, the claim of the law being unconstitutional because of it would be more tenable. It is not to be said that the highest penalty possible under the statute would in all cases be excessive; such obstructions might result in great loss of life or property or both and be so intended. The safety of travel upon our public thoroughfares, including railways, is within the purview of the statute, involving as we have said life and property. It is not the statute that imposes the particular fines, but the court, in the exercise of a discretion authorized by the statute. If such a fine is excessive within the constitutional meaning, it is the judgment imposing it that is void and not the statute. The fine in this case is twenty dollars, besides costs, and that is not excessive and is not thought to be."

In the case at bar, as in the Iowa case, the law comes near permitting the least possible punishment. We contend in the present case that the law does not fix arbitrarily an excessive punishment for violation of the provisions of the Act of May 23, 1908, and that when an excessive punishment is imposed under this Act upon any person or corporation for violation of its provisions, it will then be the proper time to raise the question of an excessive punishment within the meaning of the Constitution of the United States.

In a case arising in Texas, in a *qui tam* action for the recovery of certain penalties for not having certain cotton weighed by the public weigher as provided by statute, the law provided that any person who should have his cotton weighed by one other than the public weigher should be liable at the suit of such public weigher to damages in any sum not less than five dollars for each bale of cotton so unlawfully weighed. On the appeal the question was raised that the law was unconstitutional because of its failure to fix the maximum of the fine by express terms. After quoting several well-known authorities, the court says:

> "Is it a fair construction of the statute here to say that because it fails to fix a limit to which the penalty

> may be inflicted, the jury is thereby warranted in imposing an excessive penalty? Is it presumable that the legislature intended to authorize juries to do that which is inhibited by the Constitution? Unless the clear language of the statute requires such construction, we should give it that meaning which would harmonize the legislative intent with organic law of the State which reigns supreme over every department of government and citizen of the State. Under this law to guide us, we cannot come to the conclusion that the statute authorizes an excessive penalty to be assessed by the jury."
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> Martin *vs.* Johnson, 11 Texas Civil Appeals, 634.

In a case arising in the State of Michigan, there was a construction by the Supreme Court of that State in line with the authorities already quoted. In *In re Yell,* 107 Michigan, 228, the defendant was arrested for the violation of a certain fish law of the State. The penalty clause of the act prohibiting fishing with certain unlawful devices failed to fix a maximum penalty for its violation, and it was contended that this failure on the part of the legislature of the State to fix a maximum penalty rendered the act inoperative and void as against the Constitution of that State, which declared that excessive fines shall not be imposed. The court, however, did not take this view of it, but cited with approval the case of Frese *vs.* State, 23 Florida, 267, and held that the failure of the legislature to fix a maximum penalty in the case of a violation of the act did not render such act unconstitutional.

The second contention of the Government under this head is that the amount fixed by section 16 of the Act of May 23, 1908, is not so excessive as to render the Act unconstitutional.

The *quantum* of punishment in any particular case is not a matter which can be arbitrarily fixed. The nature of each offense must be considered by the court in imposing punishment, and the condition of the offender and the aggra-

vation of the offense must be taken into consideration. It is universally the custom of the courts to impose a very much heavier sentence on an habitual criminal than upon a man who is before the court for the first time. Then, too, as it was well said in the case of Southern Express Company *vs.* Walker, quoted above, it must be taken into consideration that the defendant in a case of this character may be a corporation of such large wealth that a fine which would deter an individual from violating the provisions of the law would not prevent such a corporation from carrying on its business in direct and willful violation of the law. All of these factors and many others must be taken into consideration by the court in imposing sentence. In the present case, were there an isolated instance of a motorman on a street car exceeding the speed limit, the court would impose a very light sentence. If, on the other hand, the corporation itself should, with the full knowledge of the law, order its motormen to drive their cars at a speed exceeding that provided by the law, the court would not feel inclined to impose a light sentence on such corporation. The court would take into consideration the nature of the offense and the character of the offender, and would impose such punishment within the maximum penalty provided by the law as to deter the railroad company from running its cars at an unlawful rate of speed. This same line of argument will apply to all other provisions of this section. The penalty clause relates to all the provisions of the section, and unless a fine of one thousand dollars is excessive as applied to each and every one of the provisions of the section, then it cannot be said that the section itself is unconstitutional because the penalty is excessive.

Reference particularly is here made to the case of State *vs.* Teeters, quoted above, where the penalty for obstructing a roadway was imprisonment in the penitentiary for not more than five years or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year, and the court there held that such a penalty would not be

improper when imposed upon a willful and malicious violator of the provisions of the act.

Great stress was laid in the lower court by counsel for the defendant upon the case of *Ex parte* Young, 209 U. S., 123. In this case a law of the State of Minnesota had been declared void because of the excessive penalty imposed by the statute, and it arose upon an application to the Supreme Court of the United States for leave to file petition for writ of *habeas corpus*. The petitioner for the writ had been adjudged guilty of contempt by the Circuit Court of the United States for the District of Minnesota, and had been sentenced to pay a fine of one hundred dollars and to dismiss certain suits which were pending in the State court. The authority of the petitioner to act in the cases pending in the State court depended upon the validity of an act of the State of Minnesota which imposed for the violation by a railroad or a railroad employee of a certain "rate law" a fine of not less than twenty-five hundred dollars nor more than five thousand dollars for the first offense, and not less than five thousand nor more than ten thousand dollars for each subsequent offense. As the Supreme Court said in the case, this provision was put in the law unquestionably for the purpose of deterring individuals from resorting to the courts to test the law. The court held that the fine was excessive, and that the law of the State of Minnesota was unconstitutional. But there is much difference between a maximum fine of one thousand dollars, as provided in our law, and a minimum fine of twenty-five hundred dollars for the first offense and a minimum fine of five thousand dollars for the second offense, provided by the Minnesota law. The one in this District is commensurate with the offense, while the provisions of the law of Minnesota shock the conscience of mankind and were intended as a prohibition upon suitors in the courts.

The Supreme Court of the United States takes the same view in the case of Cotting *vs.* Kansas Stock Yards Company,

183 U. S., 99. There was involved in this case the question of the validity of a certain penal statute of the State of Kansas. The penalties provided by the statute were punishment for the first offense of not more than one hundred dollars fine; the second, not less than one hundred dollars nor more than two hundred dollars; the third, not less than two hundred dollars nor more than five hundred dollars, and imprisonment in the county jail not exceeding six months; for each subsequent offense a fine not less than one thousand dollars and imprisonment not less than six months. The court commented upon the fact that after the third offense the fine could not be less than one thousand dollars for each offense, and that a single day's penalties would aggregate at least fifteen million dollars. The court held that fines of this nature were excessive and such as to shock the sense of mankind. But there is no parallel with the present case. There is no minimum fixed in this law, and out of abundant caution Congress has provided that each day of failure or neglect of the provisions of this section shall be regarded as a separate offense, so as to limit the number of suits for violation of the provisions of this law.

Both of these Supreme Court cases, however, so far as this case is concerned, are answered by the Supreme Court itself in the Young case. On page 147 they say:

> "It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary

> to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, *to close up all approaches to the courts,* and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

The lower court adopted this construction of the law and quoted in support thereof the above section.

Flat Wheels.

The Interstate Commerce Commission, sitting in general session, passed a regulation on November 11, 1908, relative to the use of "flat wheels" on street cars. This regulation provides:

> "9. That the use by any street railway company in the District of Columbia of car wheels causing unnecessary noise or unevenness in operation, commonly known as 'flat wheels,' be, and the same is, prohibited."

The information in the case of The Capital Traction Company, plaintiff in error, *vs.* United States, No. 2091, was filed under this regulation.

The motion to quash filed by the attorneys for the railway company in the court below raised the question of the

constitutionality of the Act of May 23, 1908, in that excessive penalties were alleged to be therein provided. This motion was argued and submitted to the Police Court at the same time as the questions involved in the two other cases now on appeal. The Police Court overruled the motion to quash, and held that the statute was constitutional. The question of excessive fines is treated at length in another part of this brief.

We contend that by the provisions of this Act Congress intended to remedy specifically that evil of which there has been so much complaint, namely, that of overcrowding the cars. It has used a word of plain and ordinary meaning, and has provided that any violation of this law shall be punished by a fine not to exceed one thousand dollars. The law is plain and mandatory, and the informations in these cases were properly drawn. The unnecessary crowding of cars has long been a matter of just complaint on the part of the people of the District of Columbia; and when Congress, considering this fact, has passed a law which is plain and definite in terms, its provisions should be enforced by the courts. It is therefore respectfully submitted that cases numbers 2092 and 2093 should be reversed, and case number 2091 should be affirmed.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

F. SPRIGG PERRY,
Assistant United States Attorney.